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Appellant's Brief in Rubin v. Old York Department of Social Services

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No. 07-2261

IN THE COURT OF APPEALS OF OLD YORK

MARGARET RUBIN,

Petitioner,

v.

OLD YORK COUNTY DEPARTMENT OF SOCIAL SERVICES AND DELIA CLARKE,

Respondents.

On Appeal from the Superior Court of Old York County
No. 06-CV-08234
Opinion dated March 3, 2007

BRIEF OF PETITIONER, MARGARET RUBIN

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This brief is part of a project studying the relationship of narrative reasoning to rule-based reasoning. I analyze the narrative element of this brief in my article *The Plot Thickens: The Appellate Brief as Story.* That article can be downloaded from SSRN at this link: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=998388. The appellate record for this mock case can be downloaded at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=998322.

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I. JURISDICTIONAL STATEMENT AND STANDARD OF REVIEW

This matter comes to the Court of Appeals on appeal from the Superior Court of Old York County in an adoption appeal. The Office of Children and Youth of Old York County denied the adoption petition of Margaret Rubin. She took a timely appeal of that decision to the Superior Court of Old York pursuant to O.Y. Civ. Code § 06-20-4 (East Pub. Co. 2003). The trial court affirmed the decision of the agency. This Court has jurisdiction of appeals from the Superior Courts in adoption matters pursuant to O.Y. Civ. Code § 04-12-02 (East Pub. Co. 2005). This appeal raises a pure question of law, and is therefore reviewed *de novo*. *In re Stevens*, 531 O.Y. 237 (1986).

II. QUESTIONS PRESENTED

1. Does an Old York statute which prohibits homosexuals from adopting children without any consideration of individual circumstances, or of the best interests of the child, violate the fundamental rights to privacy, and to family integrity, which are protected by the Due Process Clause of the 14th Amendment?

2. Does an Old York statute which prohibits a single, financially secure lesbian who has raised a child since birth from adopting that child, while permitting a heterosexual individual in the exact same circumstance to adopt the same child, violate the Equal Protection Clause of the 14th Amendment?

III. STATEMENT OF THE CASE

Margaret Rubin and Francie Kohler only wanted a child.

Having committed themselves to each other emotionally and legally, they decided, as do many committed couples, that they wanted to raise a family. But the state of Old York told them that they were unfit parents, simply because they loved each other. Without knowing anything about the depth and sincerity of Margaret's and Francie's commitment to each other, and without any individualized investigation into their fitness as parents, the state categorically declared that they, along with all other gay and lesbian citizens, were unfit to adopt and raise children.

Margaret and Francie were devoted to their dream, however. They had overcome obstacles before. In 1995, when Old York would not recognize their relationship, Margaret and Francie went to Father Roger Smith, an Episcopal priest, who sanctified their marriage. (R. at 16) In 2000, soon after the Vermont legislature approved a measure allowing gays and lesbians to enter into civil unions, Margaret and Francie went to Vermont and entered such a union. (R. at 3)

In 2002, Margaret and Francie went to several adoption agencies, seeking to be approved as adoptive parents. No agency would accept their application, however, since an Old York statute approved in 1986 provided that homosexuals could not adopt children. *Id.* Undaunted, the couple then sought the services of the Old York Fertility Clinic. Through a process of *in vitro* fertilization, Francie became pregnant, and in August of 2003, Francie gave birth to a son, John Rubin Kohler. (R. at 18)

Since Francie's job as vice president of Beautimous Cosmetics was both time-consuming and financially lucrative (R. at 17), the couple decided that Francie would return to work, while Margaret would stay home to raise Johnnie. (R. at 19) The arrangement worked well, and the

couple could not have been happier.

On September 9, 2006, Francie left her office in downtown Old York to get some lunch. A cab driver ran a red light at a high rate of speed and struck Francie, killing her instantly. (R. at 41)

Francie left no will. (R. at 6) Since Old York does not recognize the Vermont civil union, Francie's mother Stella Kohler sought and was awarded letters of administration for Francie's estate. (R. at 42) Stella, who never approved of Margaret's relationship with Francie (R. at 8), also petitioned the Old York County Office of Children and Youth (OCY) to have Johnnie declared a dependent child (R. at 5), despite the fact that Johnnie had resided with Margaret since birth (R. at 2) and calls Margaret "Mommy" (R. at 25). Since Stella is herself in ill health and unable to care for a young child, she asked OCY to place Johnnie in a foster home and ultimately for adoption. *Id.*

Margaret immediately filed a petition to adopt Johnnie, notwithstanding the Old York statute prohibiting homosexuals from adopting. OCY assigned one of its caseworkers, Delia Clarke, to do a home study. (R. at 5-8) Ms. Clarke testified at her deposition that she found Margaret to be "a devoted mother" who was "very attentive" to Johnnie, "treating him in an age appropriate manner." (R. at 33) She said that Johnnie "seemed to be quite happy" and that he was "quite attached to his mother." (R. at 34) She also concluded that the home was clean and safe, but despite these findings, Ms. Clarke recommended that the adoption petition be denied, solely on the basis that Margaret admitted that she was a lesbian. (R. at 8-10)

On March 3, 2007, the Superior Court of Old York County approved Ms. Clarke's recommendation, and denied Margaret's petition for adoption. (R. at 41-44) It also ordered

Johnnie to be taken from Margaret by OCY and placed with a foster family, pending adoption proceedings "by a heterosexual couple or individual." (R. at 44) The court did, however, stay enforcement of its order pending this appeal. *Id.*

IV. SUMMARY OF THE ARGUMENT

In 1986, the Old York legislature, reacting to a highly publicized case of child abuse, amended the Old York adoption statute to categorically prohibit homosexuals from adopting children. The amendment admits of no exception, even for the exceptional circumstances presented in a case such as this one. The best interest of the child, the touchstone principle in all child custody cases, is not even mentioned.

The amendment not only intrudes upon the privacy rights of the adoptive parent or parents, it can destroy a pre-existing family. Since the right to family integrity is a fundamental right under the Due Process Clause, strict scrutiny should be applied.

The amendment also discriminates against gay and lesbian persons. Were Margaret Rubin heterosexual, she would be allowed to adopt Johnnie. The only reason her adoption petition was denied was because she has self-identified as a lesbian. While sexual orientation has not yet been recognized as a suspect classification, sexual orientation has nothing to do with a person's capacity to be a good parent. Discrimination on that basis is based on outmoded and incorrect notions of the proper roles of gay and straight persons, and therefore strict or intermediate scrutiny should apply.

Whether strict or intermediate scrutiny or rational basis analysis applies, the 1986 amendment fails. There is no compelling state interest in preventing gays and lesbians from

adopting children, since there is no evidence that such adoptions pose any risk to the children. Likewise there is no legitimate state interest served by the prohibition. The amendment was adopted as a result of animus toward gays and lesbians, which can never be a legitimate state interest.

The prohibition is irrational in light of recent studies that show that children raised by one or more gay or lesbian parents are no more at risk for emotional problems, social or sexual dysfunction than children raised by heterosexual parents. The categorical nature of the prohibition sweeps far too broadly. A case such as the one at bar, in which a mother has raised a child since birth, cries out for special consideration, but the statute provides no mechanism for evaluating, or even acknowledging, the emotional impact it will have on an innocent three-year-old child.

V. ARGUMENT

Margaret Rubin is challenging the constitutionality of the provision in the Old York adoption law that denies gay and lesbian adults the right to adopt children. The trial court denied her appeal as a matter of law. Such decisions are reviewable *de novo* by this Court. *Jones v. Exposition Services, Inc.*, 835 O.Y.2d 425 (2000).

The Old York adoption statute provides:

§ 19-67-2 Persons eligible to adopt

(A) The following persons are eligible to adopt:
    (1) A husband and wife together; or
    (2) An adult who is not married.
(B) Homosexuals are not eligible to adopt under this statute.

O.Y. Civ. Code Ann. § 19-67-2 (East Pub. Co. 2003) (hereinafter "the Prohibition"). (R. at 45) Subsection (B) was added by amendment by the Old York legislature in 1986, after a highly-publicized incident in which a prominent musician was convicted of sexually abusing his adopted son. *State v. Smith*, 489 O.Y. 142 (1985); *Musician's Conviction Prompts Legislative Reaction*, Old York Times, Jan. 6, 1986, p. 1, col. 3.

The Prohibition violates the Fourteenth Amendment to the United States Constitution in two ways. First, it deprives Rubin of her fundamental right to privacy, and it deprives Rubin and her son Johnnie of their right to family integrity, both in violation of the substantive component of the Due Process Clause. U.S. Const., Amend. XIV, cl. 3. Second, the prohibition discriminates against gay and lesbian individuals, a classification that this court should find to be a suspect or a quasi-suspect classification, in violation of the Equal Protection Clause. U.S. Const., Amend. XIV, cl. 4. Accordingly, this Court should strictly scrutinize the Prohibition, and declare it unconstitutional because it is not narrowly tailored to serve a compelling state interest.

Even if the court declines to apply strict scrutiny, the Prohibition fails because it is not rationally related to any legitimate state interest. The Prohibition was enacted in reaction to a single incident involving a gay parent; it was therefore enacted out of animus toward homosexuals. Such animus can never be a legitimate state interest. Moreover, the Prohibition results in an irrational destruction of a healthy family unit in this case. The evidence establishes that Rubin has provided a safe and loving environment for her son, and that Johnnie is happy and emotionally attached to his mother. Destruction of this family unit because of an irrational reaction by the legislature more than twenty years ago can only wreak unknowable emotional damage on Johnnie, and potentially expose him to years of instability and uncertainty in the

foster care system. No legitimate state interest would be served by such a result.

A. The Court Should Strictly Scrutinize the Prohibition

Because the Prohibition impinges on fundamental rights of both Rubin and Johnnie, and because it discriminates against Rubin on the basis of her sexual orientation, the Court should strictly scrutinize it.

1. Margaret Rubin has a fundamental right under the Due Process Clause

The Supreme Court has long held that the Due Process Clause includes a substantive component that "protects individual liberty against 'certain government actions regardless of the fairness of the procedures used to implement them.'" *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997) (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992)). More specifically, the Due Process Clause "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Glucksburg*, 521 U.S. at 720.

The Court looks to history to determine whether an asserted right is a "fundamental right" protected by the substantive component of the Due Process Clause. The Court asks whether the asserted right is "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [it was] sacrificed." *Id*. at 720-21. If the answer to this question is "yes," then the asserted right is a fundamental right entitled to heightened protection under the Due Process Clause.

The Court has identified numerous "fundamental rights" in the past: the right to marital privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965); the right to marry, *Loving v. Virginia*, 388 U.S. 1 (1967); to have children, *Skinner v. Oklahoma*, 316 U.S. 535 (1942); to direct the education and upbringing of one's children, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) and

Meyer v. Nebraska, 262 U.S. 390 (1923); to use contraception, *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold*, 381 U.S. at 485-86; to bodily integrity, *Rochin v. California*, 342 U.S. 165 (1952); and to abortion, *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). The Court has also assumed and suggested, but not specifically decided, that there is a fundamental right to refuse unwanted, lifesaving medical treatment. *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261 (1990). Finally, the Court has held that the "private realm of family life" includes the "fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57 (2000).

At least two fundamental rights are at stake in this case: the right of prospective adoptive parents to privacy, and the right of Margaret and Johnnie to family integrity.

a. Margaret Rubin has a fundamental right to privacy

In *Lawrence v. Texas*, 539 U.S. 558 (2003), the Supreme Court struck down a Texas statute that criminalized sodomy for only same sex couples. The police discovered a gay couple engaged in a consensual sex act when they entered the petitioners' residence in response to a reported weapons disturbance. The couple challenged their convictions under the statute, alleging that the statute violated the Due Process and Equal Protection Clauses. The Court, however, resolved the case only under the petitioners' due process claim.

The Court began by framing the issue as "whether the petitioners were free as adults to engage in private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution." *Id.* at 564. Beginning with the *Griswold* decision, the Court surveyed its precedent addressing the substantive reach of the "liberty" protected by the Due Process Clause, particularly its decisions addressing the right to privacy announced in

Griswold. *Id.* at 564-75. The Court noted that the right to privacy, if it "means anything, . . . is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion . . . ." *Id.* at 565 (quoting *Eisenstadt*, 405 U.S. at 565).

The Court then revisited its decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), in which the Court had upheld a Georgia statute that criminalized sodomy regardless of whether the persons convicted under the statute were of the same sex. The Court, finding that *Bowers* was wrong when it was decided, overruled it. *Lawrence*, 539 U.S. at 578. The Court cited several factors: (1) the lack of a longstanding history of laws criminalizing only homosexual sodomy rather than sodomy in general; (2) the States' tradition of refusing to enforce their sodomy laws against consenting adults acting in private; (3) the trend in domestic and international law toward decriminalizing consensual sexual relations conducted in private; (4) the stigma and collateral consequences imposed by a conviction under the statute; and (5) several post-*Bowers* decisions by the Court, which reaffirmed the right to privacy, particularly in the realm of sexual autonomy. *Id*. at 566-577; *see also Romer v. Evans*, 517 U.S. 620 (1996) (invalidating a state constitutional amendment that deprived homosexuals of the protection of local anti-discrimination laws).

The Court, while stopping short of declaring the right to private sexual intimacy a "fundamental right," held that the right to liberty under the Due Process Clause gave the petitioners the right to engage in private sexual conduct without the State's intervention. *Lawrence*, 539 U.S. at 578. The Court then found that the statute furthered "no legitimate state interest which [could] justify its intrusion into the personal and private life of the individual." *Id.* In so holding, the Court emphasized that the case did not involve minors, those who might be injured by or coerced into sexual conduct, or those who might be unable to consent to such

conduct. *Id.* The Court also noted that the case did not involve public conduct, prostitution, or a request to the state to "give formal recognition to any relationship [into which] homosexual persons seek to enter." *Id.*

In the court below, OCY argued that *Lawrence* does not control because this case falls into one of the exceptions noted in the Court's opinion: there is a minor child involved here. *Id.*; *cf. Lofton v. Secretary of the Department of Children & Family Services*, 358 F.3d 804 (11th Cir. 2004). OCY even went so far as to claim that placing a child in a home with a sexually active lesbian would place that child at risk for developing unspecified "sexual dysfunction" as an adolescent. The trial court did not address that claim, but simply cited *Lofton* for the proposition that encouraging a traditional nuclear family with heterosexual parents was a legitimate state interest. (R. at 43)

But the sexual orientation of prospective adoptive parents is not a legitimate concern of the state. Longitudinal studies have shown that children of gay and lesbian parents are no more, or less, likely to have a homosexual orientation when they reach the age of sexual maturity. *See, e.g.*, Susan Golombok and Fiona Tasker, *Do Parents Influence the Sexual Orientation of Their Children? Findings From a Longitudinal Study of Lesbian Families*, 32 Developmental Psychology 3, 8 (1996). Other studies show that children who grow up in households with one or more gay or lesbian parents "fare as well in emotional, cognitive, social and sexual functioning as do children whose parents are heterosexual." Ellen Perrin, *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents*, Pediatrics 2002; 109; 341-344 (Official journal of the American Academy of Pediatrics) (full text at http://www.pediatrics.org/cgi/content/full/109/2/341). The American Psychological Association

recently adopted a formal resolution, based upon a review of recent research, supporting full adoption rights for gay and lesbian parents. The APA concluded that

> there is no scientific evidence that parenting effectiveness is related to parental sexual orientation: lesbian and gay parents are as likely as heterosexual parents to provide supportive and healthy environments for their children [citations omitted]; . . . [R]esearch has shown that the adjustment, development, and psychological well-being of children is unrelated to parental sexual orientation and that the children of lesbian and gay parents are as likely as those of heterosexual parents to flourish . . .

APA Policy Statement, *Sexual Orientation, Parents, & Children* (adopted by the APA Council of Representatives, July 28 & 30, 2004) (full text available at http://www.apa.org/pi/lgbc/policy/parents.html).

If Rubin were a single heterosexual woman, she would be allowed to adopt Johnnie, despite the fact that she would be just as likely to be seeking sexual partners as a lesbian woman would. There is no evidence to suggest that a heterosexual woman would be more discreet in her sexual activities than would a lesbian woman, given the presence of a young child in her home.

The Prohibition violates not only the privacy rights of prospective gay and lesbian adoptive parents, but of all adoptive parents. When a heterosexual person applies to adopt a child, he or she must respond to a highly personal question regarding his or her sexual orientation. Sexual orientation is a matter of intense personal privacy, and no person, gay or straight, should be compelled to disclose that kind of information to the state. A person's consensual sexual activity is none of the state's business. *Lawrence*, 539 U.S. at 578.

b. Margaret Rubin and Johnnie Kohler have a fundamental right to family integrity

One of the most cherished and fundamental rights of citizens is the right of parents and

children to live together in family units, free from governmental interference. In *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 842 (1977), the Supreme Court recognized a "private realm of family life which the state cannot enter . . . that has been afforded both substantive and procedural protection" under the Due Process Clause. This "private realm of family life" includes the "fundamental right of parents to make decisions concerning the care, custody, and control of their children," which the Supreme Court has described as "perhaps the oldest of the fundamental liberty interests recognized by th[e] Court." *Troxel v. Granville*, 530 U.S. 57, 65, 66 (2000).

While the courts most frequently protect families in which there are biological connections between parents and children, the existence of a biological tie is by no means required. In *Smith*, the Court suggested, though did not conclusively decide, that a foster parent/child relationship under New York law might be accorded less recognition than a competing relationship with the family of origin (blood relatives). *Smith*, 431 U.S. at 847. Of critical importance to the Court was the fact that under New York law, foster parents had no expectation that their relationship with children in their care would be permanent or enduring. *Id.* at 846. The Court emphasized that "the usual understanding of 'family' implies biological relationships, and most decisions treating the relation between parent and child have stressed this element." *Smith*, 431 U.S. at 843. The Court, however, also noted that the importance of family relationships arises not merely from biological relationships, but also from "the emotional attachments that derive from the intimacy of daily association." *Id.* at 844. "No one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship." *Id.*

The Court in *Lehr v. Robertson*, 463 U.S. 248 (1983), also stressed the importance of emotional ties between an adult and child in determining whether a family relationship exists between that adult and child. In *Lehr*, the putative father of a child challenged an order granting an adoption of the child to the new husband of the child's biological mother. The father contended that the adoption order violated his due process rights because he was not given advance notice of the adoption proceeding. The Court disagreed. *Id.* at 268. Though the Court acknowledged that the biological father's interest in having a relationship with his child can acquire "substantial protection under the Due Process clause," the Court found that the mere fact of the biological relationship did not automatically invoke this fundamental right. *Id.* at 261. Rather, the parent must establish an enduring emotional relationship with his or her child before the right will be protected. *Id.* The Court emphasized that "the mere existence of a biological link does not merit . . . constitutional protection." *Id.* Because the putative father in that case "never had any significant custodial, personal, or financial relationship with Jessica, and he did not seek to establish a legal tie until after she was two years old," the court held he was not entitled to procedural due process protections. *Id.* at 262.

A plurality of the Supreme Court has also held that a biological tie does not automatically confer substantive due process rights to family integrity. In *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), Michael fathered a child with a woman who was at that time married to Gerald. The woman later reconciled with Gerald, and Michael sued for visitation rights. Michael established that he had lived with the child and her mother from time to time and had developed a relationship with the child. Gerald resisted the petition by Michael on the basis that, under California statutory law, a child borne by a married woman whose husband is not impotent or

sterile is presumed to be the child of the husband. Justice Scalia, writing for a four-justice plurality, found that Michael, despite a paternity test showing a 98.07% probability that he was the biological father, had no liberty interest under the substantive component of the Due Process Clause, and therefore could assert no claim to visitation. *Id.* at 124. Justice Scalia concluded that recognizing Michael's claim to paternity would interfere with Gerald's right to "preserve the integrity of the traditional family unit he and [the mother] have established." *Id.* at 130. Thus, in the view of at least four justices, family stability was more important than biological ties.

Taken together, these cases establish that the right to family integrity extends to parents who have developed close emotional ties with their children, and have taken financial and social responsibility for the welfare of the child. Biological ties, while helpful, are not essential.

In the case at bar, Rubin and Johnnie have developed an extremely close "custodial, personal [and] financial relationship." Rubin has raised Johnnie as her son since birth, and with the sudden traumatic death of Francine Kohler, Rubin is the only remaining source of stability in Johnnie's life. And unlike the situation presented in *Smith*, there is no competing claim in this case from a blood relative; Francine's mother, Stella Kohler, has told OCY that she is unwilling to serve as Johnnie's custodian. (R. at 8) The choices for Johnnie are to stay with the loving mother he's known his whole life, or the foster care system. *Id.*

Nothing could be more fundamental than a bond formed between a mother and the three-year-old child that she has raised since birth. Strict scrutiny of the Prohibition is therefore required to prevent the OCY from tearing this family apart.

2. Sexual orientation should be recognized as a suspect or quasi-suspect classification

Strict scrutiny is applied not only in substantive due process cases where fundamental rights are at stake. It is also applied in Equal Protection cases when statutes discriminate on the basis of "suspect classifications" of race, alienage or national origin, because those factors "are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985). No case to date has found that sexual orientation is a suspect classification. However, the issue has been raised, but never decided, in several cases.

In *Eisenstadt v. Baird*, 405 U.S. 438 (1972), the Supreme Court struck down a law that allowed married persons, but not single persons, to obtain contraceptives for the prevention of pregnancy. The Court of Appeals had found that the statute violated "fundamental human rights," relying on *Griswold*, and was therefore unconstitutional. The Supreme Court, however, declined to decide the case on that basis; rather, it held that "whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike." Since it viewed married and unmarried persons as "similarly situated," it held that the law violated the Equal Protection Clause. In doing so, the court applied a rational basis analysis, without discussing whether any heightened level of scrutiny should be applied.

More recently, in *Romer v. Evans*, 517 U.S. 620 (1996), a number of local municipalities in Colorado had enacted ordinances that prohibited discrimination on the basis of sexual orientation. In response, the state of Colorado adopted, through a voter referendum, an amendment to the state constitution which invalidated any executive agency, legislative or judicial action at any level of state or local government which was designed to protect the status of persons based upon their sexual orientation. The Colorado Supreme Court found that this

amendment infringed the fundamental right of gays to participate in the political process, and therefore was subject to strict scrutiny; it then invalidated the amendment on the basis that it violated the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 624-25.

On appeal, the state argued that the amendment to its constitution actually promoted equal protection by denying "special rights" to a class of persons (homosexuals). In a 6-3 decision, the Supreme Court found this argument to be "implausible," *id.* at 626, and invalidated the amendment to the Colorado constitution. Justice Kennedy, writing for the majority, found that the amendment swept broadly to deny the right of legal redress to a class of persons, apparently based solely on animus against that group, which is never a legitimate state interest. *Id.* at 634-35. The court did not address the strict scrutiny argument adopted by the Colorado Supreme Court; rather, the court found that the amendment was not rationally related to any legitimate state interest, *id.*, presumably rendering any detailed analysis of strict scrutiny unnecessary.

Discrimination based on gender classifications (sometimes referred to as a "quasi-suspect classifications") are subjected to heightened scrutiny. This is because "the sex characteristic frequently bears no relation to ability to perform or contribute to society." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion). The Supreme Court has also said that gender-based classifications "very likely reflect outmoded notions of the relative capabilities of men and women." *Cleburne*, 473 U.S. at 441. Regulations examined under "intermediate" scrutiny will be upheld only if they are substantially related to an important governmental interest. *Id.*

While no Supreme Court case to date subjects legislation discriminating against gays and

lesbians to strict scrutiny or even to intermediate scrutiny, discrimination against gays and lesbians is similar in many ways to gender-based discrimination, which is subject to intermediate scrutiny. *Frontiero, supra.* Discrimination against gays and lesbians "very likely reflect[s] outmoded notions of the relative capabilities of" homosexuals and heterosexuals. *Id.* As discussed above, research performed under the auspices of respected independent organizations such as the American Academy of Pediatrics and the American Psychological Association have concluded that gay and lesbian parents are equally able to raise healthy children as are heterosexual parents. *See* studies discussed at pp. 11-12, *supra*.

As noted earlier, OCY is attempting to tear apart this family solely because Rubin is lesbian rather than heterosexual. Since sexual orientation is "seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy," *Cleburne* at 441, strict scrutiny should be applied. At a minimum, this discrimination "very likely reflect[s] outmoded notions," *id.*, and intermediate scrutiny should apply.

B. The Prohibition Fails Under Either Strict Scrutiny, Intermediate Scrutiny or Rational Basis Analysis

Under either strict or intermediate scrutiny, or rational basis analysis, the Prohibition violates both the Due Process and the Equal Protection clauses of the Constitution.

1. The Prohibition fails under strict and intermediate scrutiny

The Fourteenth Amendment "forbids [state laws] to infringe . . . 'fundamental' liberty interests *at all*, no matter what process is provided, unless the [law] is narrowly tailored to serve a compelling state interest." *Glucksberg*, 521 U.S. at 721 (quoting *Reno v. Flores*, 507 U.S. 292,

302 (1993)). Likewise, statutes which discriminate based upon suspect classifications will be upheld only if they are narrowly tailored to serve a compelling state interest. *Cleburne*, 473 U.S. at 440. Statutes subjected to intermediate scrutiny must be substantially related to important government interests. *Id.* at 441. The Prohibition fails all of these tests.

a. The Prohibition does not serve any compelling or important state interest

In the court below, OCY argued only that strict or intermediate scrutiny was inappropriate under either the Due Process or Equal Protection clauses, since the Supreme Court had not recognized any fundamental liberty interest that might apply to this case, nor had it found that discrimination on the basis of sexual orientation was either a suspect or a quasi-suspect classification. It therefore did not attempt to identify any "compelling" or "important" state interest at issue in this case, nor did it attempt to justify the Prohibition as serving any such interest.

Indeed, it is difficult to conceive of any "compelling" or even any "important" state interest that would justify OCY's attempted interference in the lives of Rubin and Johnnie. The only compelling state interest at stake in this case is the preservation of a healthy and loving family. Stated another way, the bedrock principle for any case involving child custody is that the court must do what is in the best interest of the child. *In re Adoption of O*, 719 O.Y.2d 873 (1997).

Whatever some Old York legislator's private moral objections may be to homosexuality, such a prejudice cannot be said to be a "compelling," "important," or any other kind of a state interest. As noted above, current research proves that gay and lesbian parents are equally

competent as heterosexual parents to raise healthy and emotionally stable children (*see* authorities discussed at pp. 11-12, *supra*). At a minimum, the prejudices of the legislature should never supersede the truly compelling state interest in doing what is right for Johnnie.

Since there is no compelling or important state interest served by the Prohibition, it must be declared unconstitutional.

b. The Prohibition is not narrowly tailored

Even if the Court finds that the legislature was attempting to advance the compelling state interest of protecting children when it adopted the Prohibition, it fails because it is not narrowly tailored. In fact, it sweeps as broadly as possible, declaring all gay and lesbians unfit parents. There are no provisions that require county children's services agencies to do individualized studies of prospective adoptive parents' circumstances, background or aspirations. The Prohibition admits of no exceptions, even in such extraordinary circumstances as this case presents.

Since the Prohibition is not narrowly tailored, it must be declared unconstitutional.

2. The Prohibition fails under rational basis analysis

a. The Prohibition was enacted out of animus toward gay and lesbians, which is not a legitimate state interest

In *Romer v. Evans*, the Supreme Court invalidated an amendment to the Colorado constitution, adopted by a vote of the citizens of that state, which purported to invalidate local ordinances or enactments which prohibited discrimination on the basis of sexual orientation. *Romer v. Evans*, 517 U.S. 620 (1996). Justice Kennedy, writing for the majority, wrote that the provision was apparently provoked by an animus toward a class of citizens, which is never a

legitimate state interest. *Id.* at 634.

While official legislative history in the Old York legislature is sketchy at best, there is ample evidence in the record that the Prohibition was enacted out of an irrational animus toward gay and lesbians.

In August of 2005, the wife of rock star Richard Smith sued for divorce, as well as for full custody of the couple's two sons, then aged 7 and 4. The couple had adopted the eldest boy after a visit to Africa in which they observed the horrors of starvation and malnutrition. The adoption itself made headlines in Old York, because Smith wanted to call attention to the plight of undernourished children. *Rock Star Adopts African Son*, Old York Times, March 31, 1980.

In the divorce proceeding initiated five years later, Richard's wife Chastity alleged that the reason for the divorce was that Richard was gay, an allegation he later admitted. Chastity also alleged that Richard had sexually abused their adopted son. Upon learning of this allegation in the custody proceeding, the Old York District Attorney investigated the allegation, and finding probable cause, indicted Richard for child molestation. After a very public and very contentious trial, Richard was convicted. *Guilty Verdict in Smith Molestation Case*, Old York Times, Dec. 21, 1985.

Less than two weeks later, a conservative state legislator, Rush O'Reilly, introduced legislation to bar homosexual individuals from adopting children. *Musician's Conviction Prompts Legislative Reaction*, Old York Times, Jan. 6, 1986, p. 1, col. 3. O'Reilly told reporters that he introduced the bill "to make sure that no queer ever has the opportunity to adopt a child so he can have a victim close at hand at all times." *Id.* He made it clear that the Smith conviction was the impetus for his proposed legislation. The bill was adopted 56-48 in the Old York House

of Representatives, and 23-21 in the Old York Senate, and signed into law by Gov. Jerry Robertson on May 5, 1986. Old York Leg. Rec. 1986-3451.

While it may be true that it is difficult to ascribe the explicit animus of the bill's sponsor to the entire legislative body, there is no dispute that the bill was initially proposed directly as a result of one legislator's repulsion over the criminal activities of one individual. For example, when asked whether he would have proposed the legislation if Richard Smith had been convicted of molesting a girl, Rep. O'Reilly told the reporter, "That's not what happened here and you know it. This legislation may be too late to save Smith's son from what Smith did, but if it can prevent another queer from abusing his own child, then it is our moral obligation to pass this law." Old York Times, Jan. 6, 1986.

It is also apparent that the governor who signed the legislation agreed with Rep. O'Reilly. In a signing ceremony at the statehouse, Gov. Robertson said, "Let all homosexuals be on notice. You can't come to Old York looking for victims." *Gay Adoption Prohibition Signed Into Law*, Old York Times, May 6, 1986.

The record in the court below is devoid of any evidence that anti-homosexual animus was not the motivating factor behind the adoption of this law. However, the trial court chose to ignore the evidence of this animus, instead holding that the Prohibition was rationally related to the legitimate state interest of "placing [children] in homes containing a traditional nuclear family with a mother and a father." Slip Op., R. 43. The trial court cited *Lofton* as persuasive authority.

In *Lofton*, the Eleventh Circuit found that the state had "a legitimate interest in encouraging a stable and nurturing environment for the education and socialization of its adopted children," particularly in the case of "displaced children for whom the state is standing *in loco*

parentis." *Id.* at 819. But that rationale does not fit the facts of this case. Johnnie Kohler is in no way a "displaced child." He has resided with Margaret Rubin since birth. (R. at 2) He has called her "Mommy" since he could speak. (R. at 25) OCY's own social worker, Delia Clarke, found Johnnie to be well cared-for and appropriately attached to Rubin. (R. at 8) In short, there is no need for the state to intervene in this case in an *in loco parentis* capacity. Johnnie already has a loving and committed parent.

b. The Prohibition is irrational

Even if, like the trial court, this Court frames the issue here as an effort to "encourage a stable and nurturing environment for the education and socialization of its adopted children," *Lofton*, 358 F.3d at 819, the Prohibition is not rationally related to that end. There is no evidence in this record, or in the social science literature, that suggests that gays and lesbians are categorically incapable of providing a stable and nurturing environment in which to raise children. Yet this enactment of the Old York legislature prohibits all gay and lesbian individuals from adopting children without even a minimal inquiry into the circumstances of the proposed adoption. No consideration is given to the best interest of the child, which has been described by Old York Supreme Court as "the touchstone consideration in every child custody case," including adoption cases. *In re Adoption of O*, 719 O.Y.2d 873 (1997).

Nor would removing Johnnie from Rubin's home rationally serve the state's claimed interest in stable homes for adopted children. In fact, as Delia Clarke found, Johnnie is already in a stable and nurturing environment in Rubin's home. Removing him from the mother he has known and loved from birth, and who has been found through the home study process to be a loving and nurturing mother (R. at 8, 33-35), to be placed in foster care awaiting adoption and

some unknown future time by strangers, can only serve to traumatize this young boy.

The emotional damage such an outcome would produce is impossible to predict, but is certain to be significant. Old York County's own statistics show that the median time a child older than a toddler spends in the foster care system is four years (Testimony of Delia Clarke, R. at 39, lines 21-22). Thus, if Johnnie turns out to be the average case, he would be seven years old before he were placed in another stable, long-term home—once again with people he did not know. What purpose is served by this, when he is already in a stable, loving and nurturing home?

For all of these reasons, the Prohibition, amended into the Old York adoption statute in 1986, is not rationally related to any legitimate state interest. It must therefore be declared unconstitutional.

VI. CONCLUSION

The 1986 amendment to the Old York adoption law violates the privacy of every prospective adoptive parent by requiring them to answer intensely personal questions regarding their sexual orientation. It violates the fundamental right to family integrity by forcefully separating a mother from the child she has raised from birth, for no reason other than animus expressed by the legislature against homosexuality. The best interest of the child, which should be the only consideration, is not taken into consideration at all.

Whether strict or intermediate scrutiny or rational basis analysis is applied, the Prohibition violates the 14th Amendment to the United States Constitution. This Court should declare the 1986 amendment unconstitutional, and remand this case with instructions to the lower court to approve the adoption of Johnnie Kohler by Margaret Rubin.

Respectfully Submitted

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